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Mr Allan Chiang
Privacy Commissioner for Personal Data
Office of the Privacy Commissioner for Personal Data
12/F, 248 Queen's Road East
Wanchai
Hong Kong

BY FAX AND BY HAND

Dear Allan,

Sharing of Positive Mortgage Data

Further to my letter to you dated 23 February 2011, I am writing regarding the comments of the Hong Kong Bar Association ("HKBA") in its submission on the Consultation Document which it has posted on its website. Our views, mainly in relation to legal issues raised by the HKBA, are set out below. Please also note that we have in parallel initiated discussions with the HKBA in order to address the points raised in its submission to your office.

Paragraph 9

The HKBA remarked in paragraph 9 that the Code of Practice on Consumer Credit Data (the "Code") has shifted from a pro-privacy initiative to a mechanism for legitimising "privacy-intrusion". We do not think this is a reasonable description of the purpose or intention of introducing positive or negative credit data sharing which in our view involves important public interest concerns. Specifically, we are of the view that any change in the law or the Code is about finding the right balance between the privacy interests of individuals and the public interest at a given point of time as the right to personal data privacy is not absolute. The principal objective of the industry proposal is to promote responsible lending and borrowing and prevent over-borrowing and in so doing enhance the overall financial stability in Hong

Kong. We note that HKBA itself also recognises that reducing risk of defaults is a laudable aim.

Paragraphs 23 to 34

According to the HKBA (see paragraphs 31 & 32 of its submissions), since there is no evidence on the extent to which individuals are taking on mortgages in relation to non-residential property and the delinquency rates in relation to such mortgages, or evidence that the borrowers are being untruthful, the case for saying that the additional data which the credit reference agency (“CRA”) should be permitted to collect are “necessary and not excessive” (for the purpose of assessing the credit worthiness of the individuals to which the data relate) does not begin to be made out. The HKBA further states in paragraph 33 that unless and until such a case is made out on the basis of compelling evidence, the proposal to expand the mortgage data that the CRA is permitted to collect must be rejected because it has not been shown that DPP1(1) would be complied with.

The reason why we have not provided the evidence mentioned is because without positive mortgage data sharing, we have no means of collecting such data as customers are unlikely to admit they have been untruthful and they do not necessarily borrow only from one bank but from different banks so each bank is not able to conduct a proper and comprehensive credit risk assessment. There are nevertheless anecdotal evidence of property borrowers getting mortgage loans from different banks. You would recall in November last year we sent you the attached newspaper clipping (at Annex 1) of a pensioner who was speculating in property by borrowing from multiple banks who were unable to verify her credit worthiness due to a lack of positive mortgage data sharing. There is no reason to assume that this type of behaviour is exceptional.

Furthermore, from a legal perspective, DPP1(1) provides that:

- “(1) Personal data shall not be collected unless –*
- (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;*
 - (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and*
 - (c) the data are adequate but not excessive in relation to that purpose.”*

It is important to note that there is no requirement under DPP1(1) that the purpose for which the data is collected has to be substantiated or validated by evidence. DPP 1(1) places no limit on the purpose for which data may be collected, as long as it is collected for a lawful purpose, which is directly related to a function or activity of the data user. The industry proposal is therefore clearly consistent with DPP1(1)(a) since the data are collected by the CRA for a lawful purpose directly related to its function or activity as a credit reference agency, i.e. to create a credit profile of borrowers for credit risk assessment purposes. DPP1(1)(c) then requires the data to be “adequate but not excessive” in relation to that purpose. DPP1(b) provides that subject to (c), the collection is necessary for or directly related to such a lawful purpose.

We would also like to draw reference to the book entitled “Data Protection Principles of Personal Data (Privacy) Ordinance – from the Privacy Commissioner’s perspective (2nd Edition)” published by your office. According to paragraph 5.9 of the book, the Privacy Commissioner has expressed the view that in considering whether the collection of data is in compliance with DPP(1) in the absence of any applicable code of practice, the following are relevant factors to be considered:

- (a) the particular function or activity to which the collection of the data concerned is considered directly related;
- (b) the degree of sensitivity of such data;
- (c) the legitimate purposes to be served in collecting the personal data and the adverse impact on personal data privacy;
- (d) whether there is a real need (i.e. the likelihood of such need arising) for the data to be collected in order to carry out that function or activity; and
- (e) whether there is any realistic and less privacy intrusive alternative for attaining the purpose of collection.

In the context of the industry proposal which will require changes to the Code, we and the industry have considered carefully the above factors. The data that will be contributed by the credit providers to the CRA are set out in paragraph 4.2(b)(i) of the Consultation Document, which according to the industry, are the minimum that are necessary to enable the CRA to identify accurately each individual involved in a consumer mortgage loan and compile the mortgage count. Indeed, it has been indicated in paragraph 5.31 of the Consultation Document that subject to the determination on the types

of mortgage loans to be covered under Issue 1, the proposed types of data items to be contributed and assessed “represent the minimum amount of data necessary for the purposes of assessing the credit risk of consumer credit applications”. Besides, it is proposed that the credit providers will have access to the mortgage count only, instead of the entirety of the data contributed to the CRA by credit providers as set out in paragraph 4.2(b)(i) of the Consultation Document. There is also no realistic alternative for achieving the purpose of collection of the data in respect of pre-existing mortgages. Based on the above, we have been advised by our Office of the General Counsel that there is no contravention of DPP1(1), and the data that are to be collected by the CRA as a credit reference agency appear to be “necessary”, “adequate” and “not excessive”.

Paragraphs 39 to 50

The HKBA takes the view that the transfer of the positive mortgage data to the CRA would be contrary to DPP3 (see paragraphs 44 and 47 of its submission). DPP3 is set out below:

“Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –

- (a) the purpose for which the data were to be used at the time of collection of the data; or*
- (b) a purpose directly related to the purpose referred to in paragraph (a).”*

The HKBA relies on the guidance provided by your office¹ on how you would interpret DPP3:

“In assessing whether the act in question is done for a “directly related purpose” and thus covered by DPP3(b), the Commissioner will take into account factors such as:

- *the nature of the transaction giving rise to the need for using the personal data; and*

¹ The HKBA quoted paragraph 7.25 from the older version of the book entitled Data Protection Principles of Personal Data (Privacy) Ordinance – from the Privacy Commissioner’s perspective, Office of the Privacy Commissioner for Personal Data, August 2007. The same paragraph appears in the 2010 version at paragraph 7.26.

- the reasonable expectation of the data subject.” (Emphasis added.)

The HKBA argues that since the transfer of the positive mortgage data to the CRA was not permitted under the Code at the time when the data were collected, the data subject would not have expected this to occur. Accordingly, it takes the view that the transfer will not be done for the purpose for which the data were to be used at the time of collection of the data or for a directly related purpose.

First and foremost, we would like to point out the stance adopted by your office as demonstrated by paragraph 1.12 of the aforesaid guidance is for reference only and it was stated in the guidance that such stance shall not bind your office in the exercise of the Commissioner’s statutory functions in any way. Furthermore, it was stated that rather than relying on such views the reader is urged to exercise independent judgement on the interpretations of the data protection principles and where appropriate avail himself of professional advice.

In conjunction with our Office of the General Counsel, I have considered the legal opinion of Senior Counsel obtained on this matter, which the industry has previously submitted to you, and agree with his detailed analysis based on a purposive construction of DPP3. In particular, we agree that all the DPPs should be read together and should be construed purposively to promote the objectives of the Personal Data (Privacy) Ordinance (“PDPO”). DPP3(a) refers to the purpose for which the data were to be used at the time of collection of data (“Original Purpose”), while DPP3(b) refers to a directly related purpose. In constructing what is the Original Purpose, the data user may have informed the data subject the Original Purpose explicitly, or in the absence of any explicit communication, the Original Purpose may be implied.² In determining the implied purpose for which the personal data were collected at the time of collection, all circumstances, including the reasonable expectation of the data subjects are relevant. Applying this to the industry proposal, it must have been within the reasonable expectation of the customer when applying for a loan that his personal data would be used for creating a credit profile to enable the proper assessment of credit risk. Therefore, we are of the view that the transfer of the data to the CRA to enable the creation of a credit profile for risk evaluation is within the Original Purpose albeit such purpose is an implied purpose. In this

² DPP1(3) provides that data user must take all practical steps to explicitly inform a data subject of the purpose for which data are collected. Since this is not an absolute obligation, this shows that the Original Purpose may be implied in the absence of any explicit communication by the data user to the data subject .

connection, please see paragraphs 19 to 24 of Senior Counsel's Opinion at **Annex 2**.

Further or in the alternative, we rely on DPP3(b) which enables the use of personal data for a directly related purpose to enable the transfer of personal data to the CRA. This is because the transfer of data to the CRA to enable the creation of a credit profile of the customer is directly related to the Original Purpose of credit risk assessment.

In contrast to DPP3(a), when determining the directly related purpose (which is not confined to the time of collection of data), the question is determined by whether it is directly related to the Original Purpose and is not dependent on whether the customer reasonably contemplated or expected that directly related purpose at the time of the mortgage loan application when the personal data were collected. In this connection, we refer you to paragraphs 25 to 31 of Senior Counsel's opinion at **Annex 3**.

Apart from the MPF example cited in the Senior Counsel's opinion at paragraphs 28 to 30, the Senior Counsel's view is also supported by the Administrative Appeals Board ("AAB") decision of *袁碧真 v Privacy Commissioner for Personal Data*, AAB No. 41/2006. In this case, the appellant provided her personal data, including her name, address, and telephone number to the management company when she complained about the foul smell in the corridor outside her flat. The appellant had expressly told the representative of the management company that if it decided to make a report to the police, the management should preserve her anonymity. The AAB upheld the views of the then Privacy Commissioner and ruled that although the management company had promised the appellant that it would not disclose her personal data to the police, when the management company provided the appellant's personal data to the police, it was using the personal data for a purpose which was directly related to a purpose for which her data were collected in the first place³. It is worth pointing out that in this case the ruling was made even though the transfer of information to the Police was not within the appellant's reasonable contemplation at the time the data was collected nor had the appellant given her prescribed consent for the transfer. Applying this case to the industry proposal, it would seem even if the uploading of such data to CRA was not within the applicant's reasonable contemplation, the data can still be uploaded to CRA as this serves a directly related purpose.

³ On the facts of this case, section 58(2)(a) of the PDPO provides that personal data are exempt from the provisions of DPP3 anyway. However, the decision contains detailed analysis on how DPP3 is to be applied and why the agreement between the data subject and the data user was irrelevant in considering whether DPP3 has been contravened.

Paragraphs 51 to 55

The HKBA states in paragraph 52 of its submission that the requirement of the written consent of data subjects prior to access by credit providers to the proposed additional mortgage data does not help to address the issue discussed above in paragraphs 39 to 50 in relation to Issue 3. However, the HKBA supports and welcomes the requirement for consent as a further level of privacy protection for sharing of mortgage data by CRA.

We would just emphasize that the requirement for written consent of data subjects is indeed an important level of privacy protection. As the transfer of data to the CRA is only a preparatory step, no true sharing of data will occur without the customer's written consent.

Paragraphs 56 to 60

On the benefits of the transitional period, the HKBA should perhaps refer to paragraphs 5.41 and 5.42 of the Consultation Document which explain the transitional period in greater detail. The purpose of the transitional period is to ensure any positive mortgage data collected by the CRA could not be accessed and used during the transitional period other than new applications for credit facilities and certain prescribed exceptional circumstances, such as financial difficulties of the customer, or when there is a need for debt restructuring. This may be beneficial to those who have over-borrowed in that it would offer a longer period of time in which they would be able to re-assess and revise a realistic repayment schedule with their lending institutions.

It is also useful to point out that under the industry proposal, a credit provider will have to obtain an individual's written consent to access his mortgage count whether before or after expiry of the transitional period. If an individual applies for any consumer credit from a credit provider on or after the proposal implementation date, that credit provider will obtain his written consent to access his mortgage count at the CRA. The credit provider will then access his mortgage count for processing that application or if the other specified circumstances (e.g. debt restructuring etc.) occurs during the transitional period, and will not otherwise access his mortgage count until expiry of the transitional period. There is no need to obtain the individual's written consent again for accessing his mortgage count after expiry of the transitional period because the initial written consent already covers it. On the other hand, if an individual does not apply for any consumer credit from any credit provider after the implementation date (i.e. there is no opportunity for any credit provider to obtain his written consent to access his mortgage

count at the CRA), no credit provider will access his mortgage count at the CRA for any purpose whether during or after the transitional period.

In line with the treatment of the HKMA's submissions to you in response to the Consultation exercise, we will be posting this letter on the HKMA website.

Yours sincerely,

Arthur Yuen
Deputy Chief Executive

c.c. Policy 21 Limited
The Chairman, Consumer Credit Forum
The Chairman, HKAB
The Chairman, DTCA
FSTB (Attn: Miss Natalie Li)

Encl.

Paragraphs 19 to 24 of Senior Counsel's Opinion

19. When DPP3(a) is examined it is patent that if the original purpose for which the data is to be used is to evidence a past, present and future creditworthiness profile – a necessarily dynamic position and equally an absolutely critical parameter for safe lending and safe borrowing – then it is logically the irresistible inference that this fundamental banking criterion was the common purpose of both the data subject and the data user.
20. Every customer would instantly recognise and accept that the whole point (the entire purpose) of a loan application form and the decision-making process in relation to it, is designed to transfer determinative information to the bank. A bank will not lend without a proper assessment of risk. It follows that the customer knows and understands that the bank must be properly equipped to be able to make a safe evaluation. It is decisively in the public interest that borrowers responsibly borrow and that banks responsibly lend. But this optimum situation can only operate if there is a comprehensive verified customer profile.
21. The Proposal by the CCF is manifestly in the public interest as it will promote safer borrowing and safer lending. It would be odd, indeed if a Proposal that would positively enhance the public good could be rendered stillborn by a misplaced anxiety over the utilization of personal data, when the legitimacy of banking as a core societal institution is inherently vulnerable to incomplete personal data. The Proposal is remedial from every perspective.

22. Once the Proposal is analysed from the consideration that every bank customer knows and expects that the very essence of every loan application is that the bank needs assurance of the genuine credit profile, rather than the customer's unverified claims, then it is blindingly obvious that every data subject would realise and accept that the whole purpose for which the data is to be used is to create a credit profile for risk evaluation. Indeed that purpose is self-referential of banking.
23. It matters not that earlier pre-PDPO loans were made without the bank setting out on a piece of paper just what the purpose of the data was for, as everyone knew then just as everyone now knows too what the purpose was. What has changed is the PDPO has added specific responsibilities that now give privacy a higher normative value than before the inception of the legislation. But receipt of the data was always the precondition to a loan as only by it could any bank exercise proper lending. I easily conclude that for loans made at a time when it was not unlawful to not provide a PDPO Notice, before or at the time of a mortgage loan application, Participating Institutions are fully entitled to transfer the positive data specified in paragraph 6(b) above to the CRA, as the very purpose for which the data was to be used is still the same substantive purpose involved in the transfer of it to the CRA, namely, to create a credit profile for risk evaluation.
24. But whatever view may be taken under DPP3(a), there can be no doubt that DPP3(b) too very amply authorizes the transfer of the data to the CRA. DPP3(b) authorises the transfer if the purposes is "...directly related to the purpose referred to in paragraph (a)". There must therefore be an immediate nexus between the original purpose and the later one. The connection should be generically referable to the original purpose and be the type of connection that objectively was foreseeable as either a natural development of or from the general nature of the original purpose.

Paragraphs 25 to 31 of Senior Counsel's Opinion

25. DPP3 should be interpreted in the following manner:

- (a) having regard to the wording of DPP3(a), the purposes covered by DPP3(a) are the purposes that were within the reasonable contemplation or expectation of the Customer or could be reasonably inferred as the customer's purpose at the time of the mortgage loan application when his data were collected by the institution to which the application was made (the "Original Purposes");
- (b) DPP3(b) provides for a purpose directly related to the purpose referred to in DPP3(a). There is no ambiguity between the wording of DPP3(b) and the wording of DPP3(a). By separating DPP3(b) from DPP3(a) and not repeating in DPP3(b) the reference to "at the time of the collection of the data" which appears in DPP3(a), it is clear that the legislative intent is that a "directly related purpose" should be determined by whether it is directly related to an Original Purpose but without imposing a specific timeframe for the making of that determination.

26. I note that the PCPD on DPP3 in its book entitled "Data Protection Principles in the Personal Data (Privacy) Ordinance" (the "Book") considers this very issue. In particular, paragraph 7.26 of the Book provides that the PCPD will take into account factors, such as the following, in assessing whether the act in question is done for a "directly related purpose" and thus covered by DPP3(b):

- (a) the nature of the transaction giving rise to the need for using the personal data; and

(b) the reasonable expectation of the data subject.

27. For the reasons set out above, interpretation of DPP3(b) in the manner described in paragraph 25 above substantially reflects both the letter of the provision and the legislative intent. Purpose can however also be a matter of inference, from all the circumstances. The question as to whether a purpose is a "directly related purpose" is determined by whether it is directly related to an Original Purpose and is not dependent on whether the Customer reasonably contemplated or expected that "directly related purpose" at the time of the mortgage loan application when his personal data were collected. This interpretation does not contradict the PCPD's approach and is in accordance with both it and the careful dichotomy made between DPP3(a) and DPP3(b), which eliminates any fixed initial time-point for DPP3(b).
28. Further, I note the PCPD's comment in paragraph 7.30 of the Book that in the context of human resource management, disclosure of employees' personal data to Mandatory Provident Fund ("MPF") providers for the administration of the MPF scheme is an example of use of data for a directly related purpose.
29. The MPF regime was only implemented in Hong Kong in the year 2000. Employers would not therefore have explicitly specified in the PDPO Notice distributed by them to employees before implementation of the MPF regime, that disclosure of employees' personal data to MPF providers was an Original Purpose. Moreover, such disclosure would not have been in the reasonable contemplation of the employees when their data were collected before the implementation of the MPF regime.

30. In that regard, the MPF regime is similar to the regime for sharing positive mortgage data in that collection of personal data pre-dated the implementation of the regime. On that basis of ambulatory interpretation, my opinion as to the interpretation of DPP3(b) is fully consistent with the PCPD's treatment of transfer of employees' personal data to MPF providers, as being a directly related purpose in the context of human resources management.
31. Adopting this interpretation of DPP3, granting and maintaining the mortgage loan are Original Purposes and ensuring ongoing credit worthiness of the Customer is a purpose directly related to those Original Purposes. Transfer of the Customer's personal data to the CRA under Step 1 is aimed at ensuring ongoing credit-worthiness of the Customer and is directly related to the Original Purposes and thus covered by DPP3(b).